No. 13883

In the

United States Court of Appeals

For the Ninth Circuit

LESLIE H. CHAPPELL,
Appellant,

vs.

C. D. JOHNSON LUMBER CORPORATION,
Appellee.

Brief for Appellee

Upon Appeal from the United States District Court
for the District of Oregon

HONORABLE GUS J. SOLOMON, *Judge*

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STATEMENT OF THE CASE

It is admitted that appellant was injured in the course of his employment aboard a vessel in excess of 18 tons upon the navigable waters of the United States while engaged in the work of loading the vessel with cargo (R. 26-27).

Appellant was employed as a spotter to set blocks aboard barges on which were placed crane loads of lumber being loaded from appellee's mill dock onto barges in the cargo slip of the mill dock (R. 7). Appellant

had been working as a spotter on barges approximately 2½ months at the time of the accident November 22, 1950 (R. 23). Just before the accident appellant was at the center of the barge, which was approximately 40 or 50 feet wide, and about a third of the way down toward the inshore end of the barge. He got down on the floor of the barge when the crane operator placed the load, and when the crane operator released his load appellant hopped back up and had walked 10 or 12 feet when the crane operator moved without raising his tongs high enough and the tongs of the crane bumped appellant (R. 23).

Action was commenced September 7, 1951 (R. 12), by appellant to recover damages under the Employers' Liability Act of Oregon (O.C.L.A., Section 102-1601, et seq), alleging under the "and generally" clause of that act that appellee had failed "to use every device, care and precaution practicable" (R. 9). As shown by the transcript of docket entries certified by the clerk of the district court (R. 24), on appellant's motion it was ordered that trial be postponed until appellant's condition became stationary, and no proceedings were then had until appellant gave deposition testimony September 2, 1952 (R. 23). On September 23, 1952, appellee moved for summary judgment (R. 15-16). After hearing the court found (R. 18-19):

"I.

"Defendant is a corporation organized and existing under and by virtue of the laws of Nevada, and is operating a sawmill at Toledo, Oregon, where defendant manufactures, handles and loads lumber products, a portion of which is moved by water.

"II.

"At all times herein material defendant's lumber carriers deposited loads of lumber on blocks on defendant's sawmill dock in the Yaquina River. By means of an overhead monorail crane, defendant picked up lumber from the sawmill dock and loaded the lumber on barges in the cargo slip at defendant's dock. When loaded the barges were moved on the Yaquina River by tugboats.

"III.

"Plaintiff was employed by defendant as a 'spotter' in the loading of barges. Plaintiff's work was upon the barges being loaded in the cargo slip, and his particular duty was to set and keep straight the blocks on the deck of the barge onto which the lumber was loaded by the crane. On or about November 22, 1950, plaintiff was aboard a barge upon the navigable waters of the United States, and he sustained injuries arising out of and in the course of his employment while the barge was being loaded with cargo. Specifically, plaintiff in his complaint contends: 'that on said date plaintiff had just set one set of blocks and the overhead crane or monorail had picked up a stack of lumber from the dock and had placed it on the blocks which plaintiff had set on the barge; that plaintiff was walking away from that area to get to a place of safety before the overhead crane or monorail would loosen its tongs from the load and raise the tongs; that while plaintiff was

walking away, the tongs of the crane struck plaintiff in the back, causing severe and serious injuries * * *.' Plaintiff was not a master or member of a crew of any vessel. The barge aboard which plaintiff was injured was a vessel of over 18 tons net and of approximately 200 tons net.

"IV.

"At all times herein material defendant was an employer, some of whose employees, including plaintiff, were employed in maritime employment in whole or in part upon the navigable waters of the United States."

The district court concluded (R. 19-20):

"I.

"When injured, plaintiff was engaged in maritime employment for his employer upon the navigable waters of the United States. Plaintiff's injury occurred and arose out of and in the course of his employment aboard a vessel in navigable waters of the United States.

"II.

"Recovery for disability resulting from such injury through Workmen's Compensation proceedings may not validly be provided by state law.

"III.

"The injury and disability of which plaintiff complains are exclusively within the coverage of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C., Section 901 et seq. Plaintiff can-

not maintain an action against defendant to recover damages for such injury under the Employers' Liability Act of the State of Oregon.

"IV.

"Defendant is entitled to summary judgment for the reason that the pleadings and admissions by stipulation of the parties show that there is no genuine issue as to any material fact necessary to a determination that the injury of which plaintiff complains is a matter within the federal maritime jurisdiction and within the coverage of the Longshoremen's and Harbor Workers' Compensation Act."

Appellant appeals from the order granting summary judgment, presenting two questions:

1. Does an employee, when injured while loading cargo aboard a vessel on the navigable waters of the United States under the circumstances of this case, have an election to proceed against his employer for damages under the Employers' Liability Act of Oregon in lieu of compensation under the Longshoremen's and Harbor Workers' Compensation Act?

2. Was it a necessary condition precedent to summary judgment that appellee assert and establish that it had secured the payment of compensation in the manner prescribed by the Longshoremen's and Harbor Workers' Compensation Act (Title 33, U.S.C.A., Section

932 (a)) in the absence of any allegation by appellant that appellee had not secured the payment of compensation?

SUMMARY OF ARGUMENT

I. The liability of appellee for payment of compensation under the Longshoremen's and Harbor Workers' Compensation Act is exclusive and in place of all other liability to appellant. The "twilight zone" of overlapping state and federal jurisdiction does not extend to an injury under the circumstances with which we are here concerned.

(A) Appellant was engaged in work which is traditionally maritime in nature and exclusively within the federal maritime jurisdiction.

(B) Appellant is not seeking Workmen's Compensation under a state act, but is seeking to recover damages under the state Employers' Liability Act for a maritime tort.

II. Appellee was entitled to summary judgment without having proved that it had complied with all or any of the provisions of the Longshoremen's and Harbor Workers' Compensation Act because appellant's rights and remedies are exclusively under that Act and he has not shown himself entitled to proceed with an action for damages under that Act.

ARGUMENT

I

The liability of appellee for payment of compensation under the Longshoremen's and Harbor Workers' Compensation Act is exclusive and in place of all other liability to appellant. The "twilight zone" of overlapping state and federal jurisdiction does not extend to an injury under the circumstances with which we are here concerned.

(A) Appellant was engaged in work which is traditionally maritime in nature and exclusively within the federal maritime jurisdiction.

The line of division between federal admiralty and maritime jurisdiction reserved under Article III, Section 2, of the Federal Constitution and the jurisdiction of a state with respect to an injured workman was first established in

Southern Pacific Co. v. Jensen (1917), 244 U. S. 205, 61 L. ed. 1086

It was there held that a state workmen's compensation act could not be applied to a stevedore injured on board a ship in navigable water. An historical review of the development of the law since the Jensen decision is set forth in the recent decision of this court in

Western Boat Bldg. Co. v. O'Leary (CA 9, 1952), 198 F. (2d) 409, 413 et seq

Following the Jensen decision, Congress made two attempts to extend state compensation laws to waterfront employees and each act was declared unconstitutional.

Knickerbocker Ice Co. v. Stewart (1920), 253 U. S. 149, 64 L. ed. 834

Washington v. W. C. Dawson & Co. (1924), 264 U. S. 219, 68 L. ed. 646

Congress then enacted the Longshoremen's and Harbor Workers' Compensation Act, and in limiting the application of the Act to cases where recovery "through workmen's compensation proceedings may not validly be provided by State law" Congress had in view the decisions of the Supreme Court with respect to the scope of the exclusive federal authority.

Crowell v. Benson (1932), 285 U. S. 22, 76 L. ed. 598

Congress accepted the Jensen line of demarcation between state and federal jurisdiction.

Parker v. Motor Boat Sales (1942), 314 U. S. 244, 86 L. ed. 184

This was again stated in

Davis v. Department of Labor and Industries (1942), 317 U. S. 249, 87 L. ed. 246

and most recently the Supreme Court said in

Pennsylvania Railroad Co. v. O'Rourke (1953), 344 U. S. 334, 97 L. ed. (Advance p. 262)

that New York could not have enacted statutes granting compensation for a freight brakeman's injury on navigable water aboard a car float, stating that the Jensen line of demarcation between state and federal jurisdiction has been accepted and a quarter of a century of experience has not caused Congress to change the plan.

After the Jensen decision and before the enactment of the Longshoremen's and Harbor Workers' Compensation Act, there was recognized commencing in 1922 the "local concern" doctrine, permitting the application of state compensation acts where neither the employee's general employment nor his activities at the time had any direct relation to navigation or commerce.

Grant Smith-Porter Ship Co. v. Rohde (1922), 257 U. S. 469, 66 L. ed. 321 (carpenter on partially completed vessel)

Miller's Indemnity Underwriters v. Boudreaux (1926) 270 U. S. 59, 70 L. ed. 470 (diver removing timbers from navigable river)

Alaska Packers Association v. Industrial Accident Commission of California (1928), 276 U. S. 468, 72 L. ed. 656 (fisherman endeavoring to push a stranded boat into navigable water)

Sultan Railway & Timber Company v. Dept. of Labor, etc., of Washington, and *Eclipse Mill*

Company v. Dept. of Labor, etc., of Washington (1928), 277 U. S. 136, 72 L. ed. 820 (workmen engaged in rafting and booming saw logs)

As stated by this court in

Western Boat Bldg. Co. v. O'Leary (CA 9, 1952), 198 F. (2d) 409, 414

"This local concern doctrine was in vogue until *Parker v. Motor Boat Sales*, 1941, 314 U. S. 244, 62 S. Ct. 221, 86 L. ed. 184, where, to an employment situation whose maritime aspects were of an obviously incidental nature, the Supreme Court refused to apply the 'local concern' rule and held that the death of the claimant-janitor fell within the scope of the Longshoremen's Act and not within the purview of the state compensation law.

"It was upon such an uncertain foundation that *Davis v. Department of Labor and Industries*, 1942, 317 U. S. 249, 256, 63 S. Ct. 225, 229, 87 L. ed. 246, was superimposed. Mr. Justice Black, speaking for the majority, espoused a new formula when he stated:

" 'There is, in the light of the cases referred to, clearly a twilight zone in which the employees must have their rights determined case by case, and in which particular facts and circumstances are vital elements. *That zone includes persons such as the decedent who are, as a matter of actual administration, in fact protected under the state compensation act.*' " (emphasis added)

In the Davis case petitioner's husband was a structural steelworker working for a construction company which was a contributor to the Workmen's Compensation Fund of the State of Washington. Decedent was engaged in the job of dismantling an abandoned drawbridge which spanned the Snohomish River. Steel was cut from the bridge with torches and moved "about 250 feet away for storage there to await delivery to a local purchaser." The steel when cut from the bridge was lowered to a barge by a derrick, and the barge when loaded was to be towed or hauled the 250 feet to the storage point. Deceased had helped to cut some steel from the bridge, and had gone on the barge where "His duty appears to have been to examine the steel after it was lowered to the barge and, when necessary, to cut the pieces to proper lengths." From the barge he fell or was knocked into the stream and was drowned. In reversing the decision of the Washington Supreme Court that the state could not, consistently with the Federal Constitution, make a compensation award to Mrs. Davis, Justice Black's opinion states (87 L. ed. 248):

> "Harbor workers and longshoremen employed 'in whole or in part upon the navigable waters' are clearly protected by this Federal Act; but, employees such as decedent here occupy that shadowy area within which, at some undefined and undefinable point, state laws can validly provide compensation. This Court has been unable to give any guiding, definite rule to determine the extent of state power in

advance of litigation, and has held that the margins of state authority must 'be determined in view of the surrounding circumstances as cases arise.' *John Baizley Iron Works v. Span*, 281 U. S. 222, 230, 74 L. ed. 819, 821, 50 S. Ct. 306."

The doctrine of the Davis case has been clarified by recent decisions.

Moores's Case (1948), 323 Mass. 462, 80 N. E. (2d) 478, affirmed 335 U. S. 874, 93 L. ed. 417

The Supreme Judicial Court of Massachusetts affirmed an award of state compensation to a workman employed as a rigger in a shipyard who directed the movement of material by cranes from piers on land to dry docks or ships under repair. The major portion of his work was on the piers, but occasionally he went aboard vessels. When injured he had gone aboard a vessel under repair to get where his crane operator could see him so that he could give signals. The Massachusetts court reviewed decisions establishing the proposition that a repair job on a previously completed vessel was within federal jurisdiction even though the repairs required a long period and entirely changed the character of the vessel, whereas a different rule prevails if the work is being done on a new vessel, and even though on navigable water such work remains within state jurisdiction. As a result of the Davis case the Massachusetts

court stated that, although some heed must be paid to the Jensen line between state and federal authority, the most important question has now become the fixing of the boundaries of the new "twilight zone."

> "Probably therefore our proper course is not to attempt to reason the matter through and to reconcile previous authorities, or to preserve fine lines of distinction, but rather simply to recognize the futility of attempting to reason logically about 'illogic,' and to regard the Davis case as intended to be a revolutionary decision deemed necessary to escape an intolerable situation and as designed to include within a wide circle of doubt all water front cases *involving aspects pertaining both to the land and to the sea where a reasonable argument can be made either way*, even though a careful examination of numerous previous decisions might disclose an apparent weight of authority one way or the other. We can see no other manner in which the Davis case can be given the effect that we must suppose the court intended it should have, and we must assume that the court intends to follow that case in the future.
>
> "We are the more inclined to include within the twilight zone the case of a workman *engaged in an ordinary land occupation* although occasionally going upon a dry dock or vessel to make repairs because in the latest case of that particular type decided in the Supreme Court of the United States, *John Baizley Iron Works v. Span*, 281 U. S. 222, 50 S. Ct. 306, 74 L. ed. 819, although the case was held to be one exclusively of Federal cognizance, three of the justices dissented, and Mr. Justice Black in his opinion in the Davis case refers to the Baizley Iron Works case as if it were one of those responsible for the existing confusion. Moreover, the distinction be-

> tween working on navigable water in repairing a previously completed vessel and doing precisely the same work on navigable water upon a vessel in process of construction may be thought a narrow one of doubtful practical validity." (emphasis added) (80 N. E. (2d) 481)

The California District Court of Appeal affirmed the denial of state compensation to a shipyard workman employed entirely on shore or on ships under construction who was injured while on an isolated occasion at work aboard a ship under repair assisting in repairs.

> *Baskin v. Industrial Accident Commission* (Cal., 1949), 201 P. (2d) 549

The Supreme Court of the United States, after affirming Moores's Case, supra, reversed the California District Court of Appeal in

> *Baskin v. Industrial Accident Commission of California* (1949), 338 U. S. 854, 94 L. ed. 62

upon the authority of the Davis case and Moores's Case. The decision of the California court after reversal is

> *Baskin v. Industrial Accident Commission* (Cal., 1950), 217 P. (2d) 733

The Supreme Court has evidenced its intention to abandon the earlier distinction between shipyard work-

ers engaged in new construction and shipyard workers engaged in repair or conversion work.

DeGraw v. Todd Shipyards Co. (N.J., 1946), 47 A. (2d) 338 (certiorari denied (1946) 329 U. S. 759, 91 L. ed. 655)

The latest decision of the Supreme Court in

Pennsylvania Railroad Co. v. O'Rourke (1953), 344 U. S. 334, 97 L. ed. (Advance p. 262)

required a determination as to whether the Federal Employers' Liability Act or the Longshoremen's and Harbor Workers' Compensation Act applied in the case of an injury to a freight brakeman injured while at work releasing hand brakes on railroad cars aboard a car float. In determining that the Longshoremen's and Harbor Workers' Compensation Act was applicable, the court said that that Act extended to injuries which were beyond the reach of state jurisdiction, and that under the Jensen line of demarcation New York could not have enacted statutes granting compensation for O'Rourke's injury on navigable water. The Supreme Court clearly went on to hold that it is not necessary that there be both injury on navigable water and maritime employment as a ground for coverage under the Longshoremen's and Harbor Workers' Compensation Act—the

mere locus of the accident necessarily determines the right. The court referred to its decision in

> *Nogueira v. New York, N.H. & H.R. Co.* (1930), 281 U. S. 128, 74 L. ed. 754

for the proposition that the application of the Longshoremen's and Harbor Workers' Compensation Act was made to depend on whether injury occurred upon navigable waters and recovery therefore could not validly be provided by a state compensation statute. Denying the applicability of any "duties test" based on a consideration of whether various types of construction and service workers were engaged in traditional maritime employment, the court made the following footnote reference:

> "*Davis v. Department of Labor & Industries*, 317 U. S. 249, 87 L. ed. 246, 63 S. Ct. 225, is an illustration of the difficulty encountered in applying this standard, happily not present in the case at bar. The Davis case avoided uncertainty in areas where state and federal statutes might overlap. In the present case we have two federal statutes and a line marking their coverage can be drawn." (Footnote 8, 97 L. ed.) (Advance p. 267)

One can now logically conclude that the twilight zone of overlapping state and federal jurisdiction covers injuries to various types of construction and service workers engaged in an ordinary land occupation

and not engaged in traditional maritime employment whose work, as stated in Moores's Case, supra, involves "aspects pertaining both to the land and to the sea where a reasonable argument can be made either way" and where, as stated in the Davis case, the workman is "as a matter of actual administration, in fact protected under the state compensation act."

The work of loading or unloading a vessel in navigation or commerce upon the navigable waters of the United States is and always has been considered maritime employment and not a matter of purely local concern. Such work has a direct relation to commerce and navigation, and state workmen's compensation proceedings may not validly be made applicable thereto.

Atlantic Transport Co. v. Imbrovek (1914), 234 U. S. 52, 58 L. ed. 1208

Southern Pacific Co. v. Jensen (1917), 244 U. S. 205, 61 L. ed. 1086

Northern Coal & Dock Co. v. Strand (1928), 278 U. S. 142, 73 L. ed. 232

Nogueira v. New York, N.H. & H.R. Co., supra

Employers' Liability Assur. Corp. v. Cook (1930), 281 U. S. 233, 74 L. ed. 823

Minnie v. Port Huron Terminal Co. (1935), 295 U. S. 647, 79 L. ed. 1631

South Chicago Coal & Dock Co. v. Bassett (1940), 309 U. S. 251, 84 L. ed. 732

Pennsylvania Railroad Co. v. O'Rourke (1953), 344 U. S. 334, 97 L. ed. (Advance p. 262)

After a consideration of appellant's work in the instant case, we submit that it necessarily follows, as concluded in the opinion of the district court:

> "In my opinion the loading of a barge of 18 tons or more in navigable water is maritime in nature and injuries of a workman employed on such a barge are likewise maritime, and the rights and liabilities of the parties in connection therewith are clearly within the admiralty jurisdiction and outside the reach of State compensation laws. *Southern Pacific v. Jensen*, 1916, 244 U. S. 205, 37 S. Ct. 524, 61 L. ed. 1086.
>
> "Although I appreciate the fact that the Jensen case has been criticized and distinguished on many occasions, the Supreme Court of the United States, in the recent case of *Pennsylvania Railroad Company v. O'Rourke*, 344 U. S. 334, 73 S. Ct. 302, 304, has found: 'The "Jensen line of demarcation between state and federal jurisdiction" has been accepted,' and the Court cited the Nogueira case with approval.
>
> "In my view, the facts of this case do not bring plaintiff within the twilight zone between State and Federal jurisdiction but clearly within Federal jurisdiction, and I therefore find that plaintiff may not maintain his action in this Court but must seek his remedy under the provisions of the Longshoremen's and Harbor Workers' Compensation Act." *(Chappell v. C. D. Johnson Lumber Corp.* (D. C. Ore., 1953), 112 F. Supp. 625, 626)

(B) Appellant is not seeking workmen's compensation under a state act, but is seeking to recover damages under the State Employers' Liability Act for a maritime tort.

As already noted, in restricting the Act to the area where recovery through workmen's compensation proceedings may not validly be provided by state law, Congress had in mind the Jensen case, the Knickerbocker Ice Co. case and the *Washington v. W. C. Dawson & Co.* case and intended to cover all maritime workers with compensation, either under the federal act or the state compensation acts, along the Jensen line of demarcation. As stated by the district court:

> "Even if plaintiff's work was within the penumbra where State and Federal authority overlap, in my opinion the only alternative is coverage under State Compensation. The Act was designed to protect injured workmen in hazardous occupations without regard to fault. The rationale and history of the Act as set forth in the Davis and Nogueira decisions require this interpretation of section 3.
>
> "In this case, state compensation was not available to the plaintiff for the reason that the employer elected not to come under the Oregon Workmen's Compensation Law. Plaintiff therefore seeks to enforce a common-law remedy predicated on his employer's fault. The choice here is not one between State and Federal compensation as it was in the Davis case. In my opinion, this alternative is not available to plaintiff for Congress only exempted seamen, at their own request, from automatic coverage and did not give harbor workers the same privilege. The Act is automatic except in the limited cir-

cumstances provided for in the Act. Coverage under a State Workmen's Compensation Law is necessary to avoid automatic coverage under the Act.

"Since plaintiff was not covered under the Oregon law, it makes no difference whether, at the time of the accident, he was in an exclusively Federal area or within the twilight zone." *(Chappell v. C. D. Johnson Lumber Corp., supra,* pp. 626-627)

Section 3 (a) of the Act (33 U.S.C.A., Section 903 (a)) reads in pertinent part as follows:

"Compensation shall be payable under this Act in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law."

If the language of the Act had the meaning ascribed by appellant so as to permit recovery of damages under employers' liability acts in any situation where the state could constitutionally legislate to provide workmen's compensation benefits, then the words "through workmen's compensation proceedings" could have been omitted and the statute would have read "* * * if recovery for the disability or death may not validly be provided by State law." Enactment of a workmen's compensation

act by a state was obviously not intended as the measure of a state's jurisdiction. Recovery through workmen's compensation proceedings was a condition upon the limited encroachment by states into the federal maritime jurisdiction within the lines drawn by the Jensen case.

II

Appellee was entitled to summary judgment without having proved that it had complied with all or any of the provisions of the Longshoremen's and Harbor Workers' Compensation Act because appellant's rights and remedies are exclusively under that Act and he has not shown himself entitled to proceed with an action for damages under that Act.

Section 5 of the Act (33 U.S.C.A., Section 905) reads as follows:

> "The liability of an employer prescribed in section 4 shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this Act, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under this Act, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the defendant may

not plead as a defense that the injury was caused by the negligence of a fellow servant, nor that the employee assumed the risk of his employment, nor that the injury was due to the contributory negligence of the employee."

The inconsistency in appellant's argument on this point is shown by the fact that in this appeal he is at the same time claiming the right to proceed under the quoted section of the Act with his action for damages, and also claiming that the Act does not apply and that he is privileged to proceed with a damage action afforded by the Oregon Employers' Liability Act. Appellant has never asserted that appellee did not secure the payment of compensation under Section 32 (33 U.S.C.A., Section 932) of the Act. He simply complains that appellee did not prove that such security for compensation existed and appellee was therefore not entitled to summary judgment.

If appellant seeks the benefit of the statutory exception contained in Section 905, supra, it is well settled that he must bring himself within its terms by pleading and proof. This he has not done.

Canadian Pac. Ry. Co. v. United States (CCA 9, 1934), 73 F. (2d) 831

Reynolds v. Salt River Valley Water Users Assn. (CCA 9, 1944), 143 F. (2d) 863

Aragon v. Unemployment Compensation Commission of Territory of Alaska (CCA 9, 1945), 149 F. (2d) 447

Without an allegation that appellee had failed to secure compensation, appellant has stated no cause of action against appellee under the Longshoremen's and Harbor Workers' Compensation Act and appellee was not obliged to prove that it had in fact secured compensation. As stated by the Court of Appeals for the Third Circuit under similar circumstances:

> "Thus, it would appear that the plaintiff, on her own view, has brought herself directly within the Federal Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C.A., § 901, et seq. Consequently, the plaintiff would have no cause of action in the District Court against Atlantic, the decedent's employer, unless she were to have asserted and proved that Atlantic failed to comply with the statute. * * * if it were a maritime tort action she can only proceed under the Longshoremen's and Harbor Workers' Compensation Act." *(Gladden v. Stockard S. S. Co.* (CA 3, 1950), 184 F. (2d) 510, 512)

The opinion of the district court properly answers appellant's contention on this appeal.

> "As a subsidiary point, the plaintiff alleges that the defendant failed to show that it secured the payment of compensation as required by § 5 of the Act, 33 U.S.C.A. § 905. Defendant has indicated its will-

ingness to prove that, at the time of the accident, it had complied with all the requirements of the Act. If it desires, defendant can avail itself of that opportunity. However, in my view, the failure to comply with this section does not give an injured workman the privilege of filing a common-law action or an action under the Oregon Employers' Liability Act for injuries. The workman's remedy is limited to maintaining the type of action provided for in the Act itself. See *Nogueira v. New York, New Haven & Hartford Railroad Co.*, 281 U. S. 128, 137, 50 S. Ct. 303, 74 L. ed. 754." (*Chappell v. C. D. Johnson Lumber Corp., supra,* p. 627)

CONCLUSION

The twilight zone of overlapping state and federal jurisdiction covers injuries to various types of construction and service workers engaged in an ordinary land occupation and not engaged in traditional maritime employment whose work involves aspects pertaining both to the land and to the sea, where a reasonable argument can be made either way and where as a matter of actual administration the workman is in fact protected under the state compensation act. Under this rule state compensation may now be afforded to shipyard workers engaged in ship repair as well as new construction and to construction workers engaged in such work as the dismantling and removing of a bridge. The Jensen line of demarcation leaves it unequivocally clear that an employee engaged regularly as a spotter in loading

lumber cargo aboard a vessel of more than 18 tons on the navigable waters of the United States when injured while so engaged aboard the vessel is within the exclusive coverage of the Longshoremen's and Harbor Workers' Compensation Act. To hold otherwise would extend state jurisdiction over all longshoremen and harbor workers in an all-inclusive twilight zone with no line of demarcation.

If appellant proceeds under the Longshoremen's and Harbor Workers' Compensation Act his complaint for damages under that Act must bring him within the statutory exception by alleging that appellee has not secured payment of compensation as required by the Act. Without such allegation appellant clearly stated no claim against appellee upon which relief could be granted and appellee was entitled to summary judgment.

Respectfully submitted,

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